

MEMORANDUM

MODULE : PUBLIC INTERNATIONAL LAW

CODE : INL41AO/ITR0011

DATE : SSA EXAMINATION
: 31 MAY 2019

EXAMINERS : DR M ROUX
: PROF MR PHOOKO

MODERATOR : PROF FRANZISKA SUCKER (UNIVERSITY OF THE
WITWATERSRAND

SECTION A

PLEASE ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 1

Answer the following questions:

1.1. Explain the meaning of the 'persistent objector rule' in customary international law.(3)

- *State clearly and persistently objects to a particular practice while the law on the issue in question is still developing, then the objecting state cannot be bound by the customary law rule that may emerge from the practice. Exception: jus cogens norms and obligations erga omnes.*

1.2. Discuss the approach followed by South African courts on the question whether a duty to exercise diplomatic protection is placed on states by international law. (4)

- *Kaunda: SA Government has a duty on government, in terms of its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights. Request would be 'difficult', if not 'impossible' to refuse in 'extreme cases'. SA government has to consider 'legitimate request'.*
- *Confirmed by Von Abo.*
- *No right of SA citizen/national to diplomatic protection, the right to exercise DP belongs to the state.*

1.3. Explain the meaning of the role of the African Union Commission on International Law.(4)

- *Established on Feb 2009 under art 5(2) of the Constitutive Act of the African Union.*
- *The purpose is the*
 - *codification and progressive development of international law in the African Union;*
 - *to propose draft framework agreements, model regulations etc;*
 - *to assist in the revision of existing treaties, assist in the identification of areas in which new treaties are required and prepare drafts thereof;*
 - *to conduct studies on legal matters of interest to the Union and its Member States; and*
 - *to encourage the teaching, study, publication and dissemination of literature on international law.*
- *Composition: 11 members (nationals of AU member states), no two of the same nationality. The AUCIL shall reflect and respect the principles of equitable geographical representation, the principal legal systems of the Continent and equitable gender representation.*

1.4. With specific reference to relevant decided case law, discuss whether or not the minutes of a meeting in which two states have participated in can be treated as a treaty/international agreement between the two states. (5)

- *They can be treated as a treaty. An international agreement creating rights and obligations can be constituted by the signatories to the minutes of meetings and letters exchanged. In Qatar v Bahrain, Jurisdiction, [1994] I.C.J. Reports, 112, Bahrain had argued that the Minutes were only a record of negotiation and could not serve as a basis for the I.C.J.'s jurisdiction. However, both parties agreed that the letters constituted an international agreement with binding force. The Minutes not only contain the record of the meetings between the parties, it also contained the reaffirmation of obligations previously agreed to. The Minutes stipulated commitments to which the parties agreed, thereby creating rights and obligations in international law. This is the basis therefore of the existence of international*

agreement. International agreements do not take a single form under the Vienna Convention on the Law of Treaties, and the Court has enforced this rule in the past.

[16]

QUESTION 2

Differentiate between the following:

2.1. dualism and monism;

(4)

- *Dualism: IL must be ADOPTED or TRANSFORMED into municipal law before it will apply.*
- *Monism: IL applies DIRECTLY without need to adopt or transform IL.*

2.2. contentious cases and advisory opinions before the International Court of Justice;

(4)

- *Contentious cases: disagreement on point of law or fact or conflict of legal views or interests. Opposing views.*
- *Advisory opinions: Legal question. Written request with exact statement of the question + accompanied by "all documents". Requested by UN organs.*

2.1. countermeasures and sanctions;

(4)

- *Counter-measures: Self-help or unilateral action by state against responsible state that breached international obligation (in terms of conventional or customary international law) to convince state to comply with international obligations.*
- *Sanctions: Collective non-forcible measures under international or regional organisation.*

2.1. the customary international law right to self-defence and self-defence as provided for in Article 51 of the Charter of the United Nations; (4)

- *Customary international law right to self-defence: in terms of the Caroline incident: requirements are necessity and proportionality, and can include anticipatory self-defence.*
- *Article 51 of the UN Charter: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'*

2.1. the extradition procedure followed between South Africa and associated states, and between South Africa and foreign states respectively. (8)

- *SA and associated states: Not necessary to follow diplomatic channels. "Attorney-General" (NDPP) receives: a warrant of arrest, statement with details, prima facie evidence of guilt. Magistrate → endorse + enquiry.*
- *SA and foreign states: Diplomatic channels have to be followed: request by foreign state to the Minister of Justice. A magistrate will then have to issue a warrant of arrest and conduct an enquiry, thereafter issue a certificate. May refuse to surrender.*

[24]

QUESTION 3

Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts provides that the conduct of a person or group of persons can be attributed to a state "if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that state in carrying out the conduct". Compare the manner in which this Article was interpreted by various international courts and tribunals. (8)

- *Article 8 of the ILC Articles: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the **instructions** of, or under the **direction or control** of, that State in carrying out the conduct.*
- *The latter is where the difficulty would lie, as the conduct of private persons could not normally be attributed to a state UNLESS there is SPECIAL RELATIONSHIP between the persons and the state. This would include:*

- *Persons with INSTRUCTIONS to carry out missions abroad or*
- *Groups acting under the DIRECTION OR CONTROL of the state.*
- *Degree of DIRECTION OR CONTROL is very important!*
- *Case law:*
 - *THE NICARAGUA CASE ICJ 1986: Effective control test;*
 - *THE TADIC CASE ICTY 1999: Overall control test - ICJ too strict!*
 - *THE BOSNIA GENOCIDE CASE: ICJ examined both Nicaragua (effective control) and the Tadic cases (overall control), and decided to follow Nicaragua.*
 - *DRC v Uganda*
- *Comment: students performed very badly in this question: mostly repeated wording of the question.*

[8]

QUESTION 4

In February 2011, peaceful protests in the Syrian Arab Republic ('Syria') began relating to poverty, corruption, the right to freedom of expression, and democratic rights. Soon thereafter demands were made for the release of political prisoners, the general respect for fundamental human rights, as well as economic, legal and political reforms. Soon after these events Syrian armed forces responded violently by launching military operations throughout the state. The humanitarian situation in Syria continues to deteriorate, and is becoming more severe and devastating. Since the commencement of the civil war, the Syrian government's persistent stance has been that its use of force is necessary to retaliate against attacks from a number of non-state armed opposition groups and terrorist organisations such as the Islamic State in Iraq and the Levant (ISIL) and Jabhat Fatah al-Sham. Strong evidence indicates that sexual and gender-based violence lies central to the conflict, and is deliberately used as a weapon and method of warfare. It has been widely acknowledged that violence against civilians in the Syrian armed conflict amounts to gross human rights violations, specifically genocide, crimes against humanity, and war crimes.

Answer the following questions relating to the above set of facts:

4.1. Assume the Security Council decides that the situation in Syria amounts to a breach of the international peace and security. As a result, South Africa proposes a draft resolution that would authorise the Security Council to implement any enforcement measures, including the use of force, to restore peace and security in Syria. However, despite the affirmative vote of 14 Security Council member states, Russia votes against adopting the resolution. Explain the impact of Russia's vote on the proposed draft resolution. (5)

- *Russian Federation is one of the permanent five member states of the UN SC, and therefore has a veto right during voting procedures.*
- *The situation above (implementation of enforcement measures) amounts to a non-procedural matter, requiring the affirmative vote of 9 members as well as the CONCURRING vote of PM5.*
- *By voting against the adoption of the resolution, Russia exercised its veto power, and the impact hereof is that the SC is prevented from implementing enforcement measures.*

4.2. Assume you are the legal advisor to the South African ambassador at the Security Council. Provide a brief opinion to the ambassador relating to any other appropriate enforcement measures not involving the use of force that are available to South Africa to restore peace and security in Syria. (7)

- *Two types of enforcement measures not involving the use of force: peaceful measures and non-forceful measures.*
- *Peaceful measures includes diplomatic means of settlement (negotiation, mediation, conciliation and inquiry) and judicial means of settlement (arbitration and legal settlement through the International Court of Justice).*
- *Non-forceful measures includes either counter-measures (unilateral) or sanctions (by international or regional organisation).*
- *Student to apply to set of facts. Creativity to be rewarded.*

[12]

QUESTION 5

Define the following international crimes, and provide an historical or current example for each crime:

5.1. **genocide;**

(3)

- *Can take place during time of peace or time of war with the specific intent to destroy, in whole or in part, a national, ethnic, religious or racial group, as such.*
- *Genocidal intent: dolus specialis!*
- *Genocidal acts: killing, causing serious bodily or mental harm, conditions calculated to bring about destruction of group, preventing births, forcibly transferring children.*
- *SGBV can be an act of genocide.*
- *For example: Holocaust, Rwandan genocide, Syria against Yazidi, Myanmar against Rohingya Muslims.*

5.2. **crimes against humanity**

(4)

- *Can take place during time of peace or armed conflict: inhumane acts against the civilian population with a discriminatory aspect, must be widespread and systematic.*
- *For example: apartheid in SA, Yugoslavian atrocities, etc.*

5.3. **war crimes.**

(3)

- *War crimes: take place in time of armed conflict/war(national or international) and consist of killing protected persons (for example civilians); Crimes of mistreatment; Attacks on buildings dedicated to religion, education, culture etc; Use of certain methods of warfare or weapons causing unnecessary suffering.*
- *Student must provide examples for each answer.*

[10]

SECTION B**PLEASE ANSWER EITHER QUESTION 6 OR QUESTION 7 IN THIS SECTION****QUESTION 6**

Identify and briefly define the principle of jurisdiction that the relevant state is relying on to exercise criminal jurisdiction over the following persons:

Identify and briefly define the principle of jurisdiction that the relevant state is relying on to exercise criminal jurisdiction over the following persons:

6.1. A British national is charged in South Africa for allegedly murdering a woman in Cape Town.

(2)

- *South Africa is basing their exercise of jurisdiction on territoriality: took place on SA territory.*

6.2. A South African national is charged in South Africa for alleged involvement in human trafficking in the Netherlands. (2)

- *South Africa is basing their exercise of jurisdiction on active nationality: national committed crime in other state.*

6.3. A Turkish national is charged in India for allegedly raping an Indian national in Pakistan. (2)

- *India is basing their jurisdiction on passive personality: own national was harmed in another state.*
- *Some students argued effects principle: India is experiencing the effect of the crime.*

6.4. A Mexican court charges Syrian President Al-Assad for allegedly committing crimes against humanity against Syrian nationals. (2)

- *Mexico is basing their jurisdiction on universal jurisdiction: prosecuting hostis humanis (enemy of mankind) for committing international crimes.*

6.5. A South African national attacks the American embassy in Johannesburg, and is charged in New York for allegedly committing terrorism. (2)

- *The USA is basing their jurisdiction on the protective principle: safety and security of state is at stake.*
- *Also effects principle: the USA is experiencing the effect of the crime.*
- *Also passive personality: mostly US nationals would have died because working at US embassy.*
- *Lots of students argued territoriality: wrongly argued that the US embassy is American territory.*

[10]

OR

QUESTION 7

Identify in each of the following instances whether or not the person below will be entitled to rely on immunity. You must substantiate your answer by explaining what type of immunity the person may/may not be entitled to.

7.1. The President of Syria, Bashar al-Assad, is arrested in Germany whilst he is on a state visit there for operating a vehicle above the speed limit. (2)

- *Al-Assad would enjoy immunity ratione personae: absolute personal immunity for incumbent head of state at national courts of foreign states.*

7.2. The International Criminal Court issues a warrant of arrest for the former President of the United States of America, George W. Bush, for allegedly committing crimes against humanity and war crimes in Iraq and Afghanistan. (2)

- *No immunity at the ICC: excludes it in terms of Article 27 of the ICC Statute.*

7.3. James Knox, the leader of the South Africa Freedom Fighters and a member of the South African Parliament, is arrested in England for allegedly inciting war and violence. (2)

- *No immunity: ordinary MPs do not enjoy immunities and privileges.*

7.4. The South African Police Service arrests the Chinese consular agent to South Africa for allegedly being involved in organised crime and human trafficking after intercepting his communication in an effort to gather evidence against him. (2)

- *Will enjoy immunity: communications at consular mission enjoy immunity on the territory of the receiving state and may not be intercepted.*
- *Lots of students argued that he will enjoy immunity, because he is involved in a grave crime. BUT the evidence was gained unlawfully: communications of consular missions enjoy immunity on territory of receiving state.*

7.5. The Namibian prosecuting authority issues a warrant of arrest against Angela Merkel, the president of Germany, for not making an appearance in a colonial reparation case in Namibia after issuing a summons. (2)

- *Immunity rationae personae: excessive universal jurisdiction (Arrest Warrant), absolute personal immunity.*

[10]

SUBTOTAL SECTION B:	[10]
----------------------------	-------------

TOTAL EXAM:	[80]
--------------------	-------------
